Supreme Court, U. S.
FILED
OCT 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. .....

79-648

ROY B. WOOLSEY,

Petitioner,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION, a Nevada corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

~~C. NEIL ASH,~~
~~202 South Mansfield Avenue,~~
~~Los Angeles, Calif. 90036,~~
~~(213) 939-7872,~~
~~*In Propria Persona*~~
~~*and Attorney for Elaine T. Ash.*~~

ROY B. WOOLSEY,
2099 San Joaquin Hills Road,
Newport Beach, Calif. 92660,
(714) 640-0800,
In Propria Persona.

Of Counsel:
WOOLSEY, ANGELO & THATCHER.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

I — Page

References to Opinions Below 2

II

Jurisdiction of This Court 2

III

The Questions Presented for Review 3

IV

Constitutional Provisions and Statutes 4

V

Statement of the Case 5

VI

Reasons Why the Writ Should Be Granted 10

A. The Decision of the Court of Appeals to the Effect That the Controlling Majority Shareholders May Take the Equity From the Minority Upon a Showing of Mere "Independent, Legitimate Business Reasons" Conflicts With the Applicable California Law 10

B. Respondents Did Not Satisfy Their Federal Fiduciary Duties; Whether or Not Such a Duty Will Bar the Exercise of a Power to Merge Corporations Has Not Been and Should Be Settled by This Court 15

C. Lengthy Findings, Proposed by Counsel and Adopted Verbatim by the Court on the Day of the Decision and Before Service on Opposing Counsel, Should Be Given Little Weight and This Court Should Settle the Extent to Which Such Findings Be Given Weight 16

Page

D. Only by Such a Departure by the Lower Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision, Did the Court Make the Clearly Erroneous Findings That the Plan and Its Implementation Were Fair, Just and Equitable, and That the Trustees and Mr. James W. Leisner (a Director of Both Air Cal and Westgate) Satisfied Their Fiduciary Obligations to Shareholders of Air Cal 20

E. The Opinion Below That the Consummation of the Merger Without Petitioner's Obtaining a Stay Rendered the Appeals Moot Raises a Question Not Heretofore Settled Which Should Be Settled Contrary to the Position Taken by the Court Below 28

TABLE OF AUTHORITIES CITED

Cases Page

Abney v. United States, 431 U.S. 651 (1977) 30

American Service Co. v. Henderson, 120 F.2d 525 (4th Cir. 1941) 11

Anderson v. General Dynamics Convair, etc., 589 F.2d 379 (9th Cir. 1978) 21

B-F Building Corporation v. Coleman, 284 F.2d 679 (6th Cir. 1960) 11

Bosley v. City of Euclid, 496 F.2d 193 (6th Cir. 1974) 31, 32

Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972) 11

Castle v. United States, 399 F.2d 642 (5th Cir. 1968) 30

Cities Service Co. v. Dunlap, 308 U.S. 208 (1939).. 21

Combined Metals Reduction Company, In the Matter of, 557 F.2d 179 (9th Cir. 1977) 15, 28, 29, 31

Crain v. Electronic Memories & Magnetics Corp., 50 Cal.App.3d 509; 123 Cal.Rptr. 419 (1975) .. 13

Credit Manager's Association v. Superior Court, 51 Cal.App.3d 352; 124 Cal.Rptr. 242 (1975) 21

Edward B. Marks Music Corp. v. Colorado Mag., Inc., 497 F.2d 285 (10th Cir. 1974) 18

Fisher v. Pennsylvania Life Co., 69 Cal.App.3d 506; 138 Cal.Rptr. 181 (1977) 12

Frazier v. Alabama Motor Club, Inc., 349 F.2d 456 (5th Cir. 1965) 18

Page

Green v. Santa Fe Indus., Inc., 533 F.2d 1283 (2d Cir. 1975), reversed Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) 14, 15

Jones v. H. F. Ahmanson & Co., 1 Cal.3d 93; 81 Cal.Rptr. 592, 460 P.2d 464 (1969) 12, 21

Kemp v. Angel, 381 A.2d 241 (Del.Ch. 1978) 14

Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975) 13

Las Colinas, Inc., In Re, 426 F.2d 1005 (1st Cir. 1970) 18

Lenters, In Re, 225 Fed. 878 (E.D. Pa., 1915) 16

Marshel v. AFW Fabric Corp., 533 F.2d 1277 (2d Cir. 1976) 14

Meinhard v. Salmon, 249 N.Y. 458; 164 N.E. 545 .. 15

Mills v. Electric Autolite Co., 396 U.S. 375 (1970) 31

Moulded Products, Inc., In the Matter of, 474 F.2d 220 (8th Cir. 1973), cert. den. 412 U.S. 940 ....15, 16

Mueller v. MacBan, 62 Cal.App.3d 258; 132 Cal. Rptr. 222 (1976) 21

Pepper v. Litton, 308 U.S. 295 (1939) 13, 20

Ramberg v. American Investment Co. of Illinois, 231 F.2d 333 (7th Cir. 1956) 32

Schwerman Trucking Co. v. Gartland Steam Ship Co., 496 F.2d 466 (7th Cir. 1974) 17, 18

Security Financial Co., In Re, 49 Cal.2d 370; 317 P.2d 1 (1957) 12

Sherr v. Winkler, 552 F.2d 1367 (10th Cir. 1977).. 15

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 14, 15, 25

Page

Singer v. Magnavox, 380 A.2d 969 (Del. Supr. 1977) 14

Tanzer v. Intl. Gen. Ind., Inc., 379 A.2d 1121 (Del. Supr. 1977) 13, 23

United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 17

United States v. El Paso Natural Gas, 376 U.S. 651 (1964) 18

Wolf v. Weinstein, 372 U.S. 633 (1963) 15

Young v. Valhi, Inc., 382 A.2d 1372 (Del. Ch. 1978) 13, 23, 26

Rules

American Bar Association, Code of Professional Responsibility, Rule DR 7-110(A) 17

Federal Rules of Civil Procedure, Rule 52(a) 18, 19

Federal Rules of Civil Procedure, Rule 62(a) 28, 29

Federal Rules of Evidence, Rule 302 21

Federal Rules of Evidence, Rule 1101 21

Rules of Professional Conduct of the State Bar of California, Rule 7-108 17

Securities Exchange Commission Regulations, Rule 10b-5 (17 C.F.R. 240.10b-5) 14

Statutes

Securities and Exchange Act of 1934, Sec. 10 14

United States Code, Title 11, Sec. 47(c) 2

United States Code, Title 11, Sec. 75 .....4, 11, 16

United States Code, Title 11, Sec. 586 .....4, 11, 16

Page

United States Code, Title 11, Sec. 589 .....4, 16
United States Code, Title 11, Sec. 704 4
United States Code, Title 11, Secs. 1106-08 4
United States Code, Title 28, Sec. 1254(1) 2
United States Constitution, Fifth Amendment 4

Textbooks

Carter, Judge James M. and Bruce D. Wagner, Findings of Fact, 1 San Diego Law Review, pp. 13, 23-24, 25, 32, 35 (1964) 18

4 J. Corp. Law, No. 1, pp. 122, 124 (Fall, 1978) 25, 26

O'Neal and Derwin, "Oppression of Minority Shareholders", p. 62 27

IN THE

Supreme Court of the United States

October Term, 1979
No. .....

ROY B. WOOLSEY,

Petitioner,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION, a Nevada corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner hereby requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (J. Carter) affirming an order of the District Court for the Southern District of California, the "Reorganization Court" herein (J. Nielsen), in proceedings under Chapter X of the United States Bankruptcy Act, to reorganize Westgate-California Corporation, "Westgate" herein, debtor. Said Order of the Reorganization Court authorized a merger.

In addition to the reasons stated herein, Petitioner requests the Writ for the reasons in the petition to be filed by C. Neil Ash and Elaine T. Ash for certiorari to review said judgment.

I
REFERENCES TO OPINIONS BELOW.

The opinion of said Circuit Court of Appeals (A. 1-19)[1] is reported in 601 F.2d 395 (9th Cir. 1979). Its order denying petitions for rehearing (A. 20) is not reported.

The only opinion of the Reorganization Court was the unreported "Findings of Fact, Conclusions of Law and Order" (A. 21-46; Clk. R. 384-408,[2] exclusive of exhibits thereto).

II
JURISDICTION OF THIS COURT.

The judgment of said Court of Appeals, the review of which is sought hereby, was entered on May 30, 1979 (A. 1-19). On June 13, 1979, petitioner filed a timely petition for rehearing which was denied by order entered on August 6, 1979 (A. 20).

The statutory provisions which confer jurisdiction on this court are 11 U.S.C. §47(c) and 28 U.S.C. §1254(1).

---

[1]Citations herein to A. are to the Joint Appendix, a separate volume prepared for use herein and in the petition by C. Neil Ash and Elaine T. Ash for certiorari.

[2]Citations to "Clk. R." are to Clerk's Record. Pages 1 to 382 thereof are in the Record on Appeal 77-3662 (the Ashes' appeal); pages 384-490 thereof are in the record on this Petitioner's appeal 78-1227; pages 491-1980 thereof are in the Record on Appeal 77-3388 (Valley National Bank's appeal).

Citations to "Rptr." are to the Reporter's Transcript of Hearings, in the Record on Appeal 77-3662.

Citations to "Info. Stmt." are to the definitive "Information Statement in Connection with a Special Meeting of Shareholders of Air California to be Held on December 21, 1976", in the First Supplemental Record on Appeal 77-3662.

Each of the foregoing records is part of the record on Petitioner's appeal (Clk. R. 440-441).

III
THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether the decision of the Ninth Circuit Court of Appeals, that a controlling shareholder of a corporation may effect a cash freeze-out of the minority shareholders without showing a compelling business purpose for the controlled corporation, conflicts with the California law governing such transaction?

2. Whether, in addition to the California requirement aforesaid, the Trustee of the controlling shareholder in reorganization proceedings has a federal fiduciary duty to the minority shareholders of the controlled solvent subsidiary and the extent of such duty?

3. Whether the plan of merger and its implementation were fair to the minority?

4. Whether the Court's adopting, verbatim, the written findings proposed by counsel without prior service on Petitioner, affects the weight to be given such findings?

5. Whether the opinion of the Court of Appeals sanctioned such departures by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Supreme Court's power of supervision?

6. Whether consummation of the merger on the day the Reorganization Court made its oral decision and written order authorizing the merger and Petitioner's not seeking a stay bars all equitable relief and whether the foregoing render the appeal moot?

IV
CONSTITUTIONAL PROVISIONS AND STATUTES.

Amendment 5 to the United States Constitution provides:

> "No person shall . . . nor be deprived of life, liberty or property without due process of law";

At all times material herein, 11 U.S.C. §586 provided:

> "A trustee . . . shall be vested with title as a trustee under Section 72 of this title would have." (new §§1106-08 include provisions similar to above [former §586]).

11 U.S.C. §75 provided:

> "(a) Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest . . .". (new §704 includes provisions similar to the above [former §75]).

11 U.S.C. §589 provided:

> "A trustee or debtor in possession, upon authorization by the judge, shall operate the business and manage the property of the debtor during such period, limited or indefinite, as the judge may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate." (new §1108 contains provisions similar to above [former §589]).

V
STATEMENT OF THE CASE.

The order of the Reorganization Court granted the respondent's application for approval of, and authority to effect, the merger of Air California, "Air Cal" herein, a California Corporation 81% owned by Westgate, into a wholly owned California subsidiary of Westgate thereby freezing out the minority shareholders (A. 22-46). Petitioner was a shareholder of said Air Cal.

In 1967 Air Cal commenced operations as an airline. In 1970, it issued sufficient new shares to Westgate so that, along with the promotional shares acquired by Westgate, at all times thereafter, Westgate held over 78% of the outstanding stock in Air Cal (Clk. R. 1974; Rptr. 1-14-77, p. 52).

In 1972, Air Cal made a profit; thereafter its profit before income taxes increased about 20% annually (Clk. R. 1975; Rptr. 1-14-77, p. 52) and such increases were assumed for the future in determining reorganization value (Cadenasso's depo. 62 to 64). It added routes or flights each year from 1971 to 1976 (Rptr. 1-14-77 p. 89).

PSA offered $15.75 per share for stock in Air Cal (Rptr. 1-14-77, pp. 86, 87).

The Securities and Exchange Commission, "SEC" herein, caused the suspension of trading in the stock in Air Cal from May 11, 1973 to February 28, 1974 (Info. Stmt. 11).

In July, 1973, respondent Herbert Kunzel became a director of Westgate and in October, 1973, its president (Info. Stmt. 28).

On February 26, 1974, Westgate filed a petition under Chapter X of the Bankruptcy Act, and respond-

ents Curvin J. Trone, Jr. and Herbert Kunzel became respectively its trustee and additional trustee. In 1974, Messrs. Kunzel, Trone and James W. Leisner, a director of Westgate, became directors of Air Cal and the Federal Deposit Insurance Corporation sued Air Cal for $6,950,000.00 principal and interest due on notes, the loan proceeds of which were not received by Air Cal, and for a like sum as punitive damages (Info. Stmt. 28, App. V, pp. 42, 45 and F-25).

Also, in January, 1975, the Trustees made a contract with Air Cal that Air Cal pay to Westgate 82% of Air Cal's tax savings by reason of the filing of consolidated tax returns with Westgate (Info. Stmt. 25, 26).

The high bid and asked over-the-counter prices for Air Cal stock were, in 1974: $11¾ to 12½; in 1975: 8¼ to 9; and in the first one-half of 1976: 9 to 9¾ (Info. Stmt. 11), notwithstanding that it had sold as high as $26.00 a share before 1971 (Clk. R. 1975; Rptr. 1-14-77, p. 52).

For each accounting period during the Chapter X proceeding, Westgate suffered operating losses while Air Cal made profits.

Although faced with large requirements for "reequipment" (Rptr. 1-14-77, p. 77), Air Cal called its seven percent (7%) convertible debentures for redemption as of August 10, 1976. Such debentures with a par value of $3,361,000.00 were redeemed for $3,492,000.00 and debentures with a par value of $73,000.00 were converted into common stock (Info. Stmt. F-58).

In early October, 1976, Mr. Kunzel informed Air Cal's president Robert Clifford that Westgate was considering a merger of Air Cal; until then Mr. Clifford had never considered the possibility of any reorganization for Air Cal (Rptr. 1-14-77, pp. 74-75). Shortly thereafter Westgate and Air Cal jointly retained two investment bankers to give an opinion to Westgate and Air Cal together of the value of minority holders' shares in Air Cal (Rptr. 1-14-77, p. 69).

On November 16, 1976, Messrs. Kunzel and Trone, in the presence of the attorney for them in their capacity as Trustees of Westgate, participated in the discussions and unanimous vote of the Board of Directors of Air Cal to approve the merger of Air Cal into Westgate's wholly-owned subsidiary.

The agreement of merger so approved provides that Air Cal shareholders receive a "Westgate Common Equivalent Certificate", "certificate" herein. Said certificate is not assignable and can be surrendered for $13.00 cash, or more as determined by the Reorganization Court. In the event that certain conditions occur (including that Westgate not be adjudged bankrupt, that it be reorganized, that the plan call for a corporate survivor and said survivor issue stock) the certificate will be converted into stock of the new Westgate and, at holder's option, the stock will still be convertible into cash (Info. Stmt. 4, and Ex. A to App. II).

The common stock of new Westgate into which a certificate will be converted will be such number of shares of new Westgate, if any, as have a reorganization value to be determined at some future date equal to the cash value of such certificate (A. 32-34; Info. Stmt., Appendix II, Exhibit A, page 1; Rptr. 10-4-77, pp. 25-26). Trustees' experts appraised stock in Air Cal at $12.50 per share based on earnings shown

in financial statements for periods through June 30, 1976, less than 7 times the then current annual earnings. Mr. Cadenasso's studies on the reorganization value used 9 and 9.1 times the expected future earnings, including post June, 1975 earnings of Air Cal which would, but for the merger, have been attributable to minority shareholders (Rptr. 1-14-77, pp. 96, 102; Valley's Exhibits A, B and C), assuming over 20% per annum increases in earnings (Mr. Cadenasso's depo., 62 to 64). Mr. Cadenasso's predicted reorganization value assumed the value of stock in Cal Air at $25.00 per share (Mr. Cadenasso's depo., 19 to 22; 100 A).

Proxies were solicited by Air Cal for prior shareholder's meetings but not to vote on the merger. Among other papers, an Information Statement concerning the merger was mailed to each shareholder. On December 21, 1976, Westgate's 81% of the outstanding stock of Air Cal was voted for, and the minority shares were voted 10 to 1 against the merger (Clk. R. 1978, Rptr. 1-14-77, p. 52).

On August 1, 1977 the California Commissioner of Corporations, in a separate proceeding, ruled that the merger would constitute a distribution on the 121,-427 promotional shares in Air Cal held by Westgate, prohibited by the permit for the promotional shares until cash investors shall have received a sum in excess of the cash invested plus 5% a year. The Commissioner released the conditions on the promotional shares on condition that no less than $15.00 in cash per share be paid to the minority shareholders and that the merger be determined to be fair by the Reorganization Court (Clk. R. 2493, 2510, 2576).

Although the Trustees' application for authority to effect the merger alleged certain business reasons for the merger, the Reorganization Court sustained the Trustees' objection to cross-examination by the objecting minority shareholders on the alleged reasons for the merger as being irrelevant (Rptr. 1-14-77, pp. 44 and 57) and said that the issue was whether or not the $15.00 per share was fair (Rptr. 10-4-77, pp. 24-25).

On May 23, 1977, the Trustees gave a notice of further hearing on their application to effect a merger with Air Cal in which they stated that there were problems relating to tuna and pet food operations. "which, apart from Air California, constitute Westgate's major continuing business" and, "pending clarification of these current uncertainties in the outlook for the sea food operations, the Trustees anticipate that they will delay the presentation of a proposed plan of reorganization for Westgate" (Clk. R. 2553).

The Trustees recommended that the price be raised to $15.00 per share in Air Cal. Mr. Kunzel testified that the Trustees had yet to formulate a plan and that the proposed Air Cal merger was an initial step towards the reorganization (Rptr. 10-4-77, pp. 19, 20).

On January 14, 1977 and October 4, 1977, the Reorganization Court took evidence and on October 12, 1977, made its decision to grant the application and signed the findings and order (A. 21-46).

On appeal the Ninth Circuit affirmed the order (A. 1-19).

VI

REASONS WHY THE WRIT SHOULD BE GRANTED.

A. The Decision of the Court of Appeals to the Effect That the Controlling Majority Shareholders May Take the Equity From the Minority Upon a Showing of Mere "Independent, Legitimate Business Reasons" Conflicts With the Applicable California Law.

The state question decided herein is especially important to the administration of estates under the United States Bankruptcy Act. It is contrary to the best interests of those estates to permit a trustee to take from the minority shareholders of a solvent subsidiary of the debtor or bankrupt. One of the impediments to successful proceedings under the Bankruptcy Act is the reluctance of potential investors, creditors and customers of solvent and profitable subsidiaries or other entities of the bankrupt or debtor to deal with such subsidiaries and entities because of the insecurity and uncertainties caused by the power of the trustee and the court to affect their investment or other rights. Shares in such subsidiaries, held by such minority, trade at lower prices than they would without the proceeding under the Bankruptcy Act. Such lower price hampers the raising of equity capital and credit for the use of the profitable subsidiary and the debtor. These factors reduce the chances of successful reorganizations.

The minority shareholders are entitled to rely on the separateness of corporate existence of a solvent subsidiary of debtor or bankrupt and the shareholders' interest should not be subject to the uncertainties and the administrative costs of bankruptcy or reorganization

proceedings which so often consume so much of the estate as to leave the equity holders and even the creditors unsatisfied.

The expansion of jurisdiction of bankruptcy courts under the Bankruptcy Reform Act of 1978 makes protection of third parties more important.

This case is appropriate for a decision on the question raised because there was no testimony nor findings that the merger was not for the purpose of freezing the minority out, nor was there any evidence or any finding to the effect that there was a compelling purpose.

Likewise, the limitation imposed under the California case law on the exercise of corporate statutory powers by fiduciaries (controlling shareholders and directors) is an important state law matter. Protection of the minority encourages investment to the benefit of the entire economy.

The Court of Appeals' opinion herein correctly assumed that, in exercising debtor's powers, the Trustees, as controlling shareholders and as directors of Air Cal, were required to comply with California fiduciary duties (A. 8 and 11-12). In this case, the Trustees merely exercised powers of the debtor succeeded to under the Bankruptcy Act, 11 U.S.C. §§586 and 75, and stood in the shoes of the debtor with no greater rights than the debtor had: *American Service Co. v. Henderson*, 120 F.2d 525, 530 (4th Cir. 1941). See also, *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 428-429 (1972), and *B-F Building Corporation v. Coleman*, 284 F.2d 679, 682 (6th Cir. 1960).

However, the Court of Appeals came to the erroneous conclusion herein that, under California law, the controlling shareholders may take advantage of their power

over the minority by depriving the latter of their equity in, and forcing them out of, an enterprise when the majority will acquire that equity if merely "(1) the merger . . . has independent legitimate business reasons and benefits the corporation, and (2) the minority are treated fairly and without disadvantage." (A. 12).

The business reason or "business judgment" test of corporate action applies where the controlling shareholder takes nothing from the beneficiary of the fiduciary duty; for example, forcing a minority to give up its interests upon a merger into a third party under a plan pursuant to which the majority also gives up its interest on the same terms.

However, where the fiduciary takes from the minority, California cases require that either there be "no alternative" to the corporate action or there be a "compelling business purpose" for it. The opinion herein incorrectly states the rule of each of the cases cited therein on this point (A. 12). In *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93, 110; 81 Cal.Rptr. 592, 460 P.2d 464, 471 (1969), the court held that relief was available to the minority because the majority did not show that there was no alternative to the action taken and in *Fisher v. Pennsylvania Life Co.*, 69 Cal.App.3d 506, 513; 138 Cal.Rptr. 181 (1977), because a compelling purpose was not shown. In *In Re Security Financial Co.*, 49 Cal.2d 370, 376; 317 P.2d 1 (1957), the California Supreme Court said:

> ". . . He did not act in bad faith in doing so for a shareholder . . . may protect his investment by dissolution . . . when, as in this case, all alternative methods are foreclosed, no advantage is secured over other shareholders, and no rights of third parties will be adversely affected."

The Ninth Circuit stated in *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 233 (9th Cir. 1975);

> ". . . But language in *Ahmanson* requires management to demonstrate more than that the corporation derived some advantage from its actions. The majority shareholders in *Ahmanson* exercised control over the corporation for their own advantage:
>
> > without regard to the resulting detriment to the minority stockholders and in the *absence of any compelling business purpose* . . . At the trial they may present evidence tending to show such good faith or compelling business purpose that would render their action fair under the circumstances." [Emphasis added].

Crain v. Electronic Memories & Magnetics Corp., 50 Cal.App.3d 509, 522; 123 Cal.Rptr. 419 (1975) states the rule as requiring that there be no alternative.

In *Pepper v. Litton*, 308 U.S. 295, 308 and 311 (1939), this Honorable Court said that the majority shareholders and directors have fiduciary duties to the minority and cannot take a benefit from the latter.

There is a growing recognition in the courts of the fiduciary duty of a controlling shareholder to the minority in merger transactions. In *Tanzer v. Intl. Gen. Ind., Inc.*, 379 A.2d 1121, 1124 (Del. Supr. 1977), the court said that the interest of the majority must ". . . not be suspect as a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders . . .". In *Young v. Valhi, Inc.*, 382 A.2d 1372, 1378 (Del. Ch. 1978), the court said the purpose must not be contrived.

It was held that the majority's taking the equity from the minority by a merger violated SEC Rule 10b-5 in *Marshel v. AFW Fabric Corp.*, 533 F.2d 1277 (2d Cir. 1976); a concurring judge said also that there was a breach of fiduciary duty under New York law. In *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283 (2d Cir. 1975), reversed in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), a concurring opinion quoted The Wall Street Journal:

> " '[a] move to go private ordinarily creates a conflict of interest . . .' "

and Barron's that:

> " 'Generally, it is the low price of the stock rather than declining earnings which sends firms private . . .' " (page 1294).

This Honorable Court, in *Santa Fe Indus., Inc. v. Green, supra*, held that the mere breach of a fiduciary duty is not a violation of SEC Rule 10b-5 or §10 of the Securities and Exchange Act of 1934; fiduciary duties are provided by State law and vary from State to State. However, the *Marshel* and *Green* cases represent sound decisional law on New York and Delaware merger laws, and Delaware immediately adopted the rule in the landmark *Singer v. Magnavox*, 380 A.2d 969 (Del. Supr. 1977) as to statutory long form mergers overruling prior case law and applied the rule to short form mergers in *Kemp v. Angel*, 381 A.2d 241 (Del. Ch. 1978).

B. Respondents Did Not Satisfy Their Federal Fiduciary Duties; Whether or Not Such a Duty Will Bar the Exercise of a Power to Merge Corporations Has Not Been and Should Be Settled by This Court.

The existence and extent of Trustees' federal fiduciary duty arising out of Trustees' powers and duties under the bankruptcy laws involves an important question of federal law for the reasons stated at the beginning of Point A, hereinabove.

We find no decision by this Honorable Supreme Court determining whether the Trustee in a reorganization or other bankruptcy proceeding has a federal fiduciary duty to the minority shareholders of the subsidiary controlled by debtor. *Santa Fe Indus., Inc. v. Green, supra*, in which this court ruled that a breach of fiduciary duty by the majority in merging a partially owned subsidiary into the majority did not constitute a breach of federal securities laws, does not bar a federal fiduciary duty for federally appointed trustees or mergers of solvent subsidiaries into a debtor under the Bankruptcy Act.

Trustees are charged with a "level of conduct . . . higher than that trodden by the crowd.": *Meinhard v. Salmon*, 249 N.Y. 458, 464; 164 N.E. 545, and a similar standard was required in *In the Matter of Combined Metals Reduction Company*, 557 F.2d 179, 196-197 (9th Cir. 1977).

Trustees are fiduciaries with a duty to treat all parties fairly as held in *Sherr v. Winkler*, 552 F.2d 1367, 1374-75 (10th Cir. 1977), citing *Wolf v. Weinstein*, 372 U.S. 633 (1963) and *In the Matter of Moulded Products, Inc.*, 474 F.2d 220 (8th Cir. 1973),

cert. den. 412 U.S. 940. The trustee is a fiduciary and stake holder as held in *In Re Lenters*, 225 Fed. 878, 883 (E.D. Pa., 1915).

A fair construction of the powers of the trustee under the Bankruptcy Act, particularly 11 U.S.C. §§75, 586 and 589 then in effect (See IV above), over assets of the debtor and power to affect the rights of third persons interested in assets such as solvent subsidiaries of debtor imposes on the trustee a duty to be fair to such third person. The rule should give as much protection as the California rule requiring that there be no alternative or a compelling business purpose before taking from the minority to give to the majority.

C. Lengthy Findings, Proposed by Counsel and Adopted Verbatim by the Court on the Day of the Decision and Before Service on Opposing Counsel, Should Be Given Little Weight and This Court Should Settle the Extent to Which Such Findings Be Given Weight.

Although this Honorable Court has indicated that a Court may adopt findings proposed by a party, what is meant by their being less helpful or that they are not given the same weight as other findings needs clarification. Also, we find no federal appellate decision settling the question as to whether the Court may adopt such findings when presented by a party without prior service on opposing counsel and opportunity to voice objections and comments. Where the action authorized by an order can be taken, absent a stay of the order, the effect on the right of appellate review of making such findings and the order thereon on the very day of the decision, this question ~~becomes~~ MAKES more important.

Mid morning, on October 12, 1977, the clerk said that the Reorganization Court had decided the matter and would sign an order that day. The findings (A. 21-46), 26 printed pages exclusive of the several exhibits attached thereto, were presented to the Court for signature and signed verbatim without having first been presented or mailed to petitioner. The names and addresses of Trustees' counsel were in the upper left of the first page and the name and address of the firm of such counsel were printed in the left margin of each of the other pages.

Rule 7-108, Rules of Professional Conduct of the State Bar of California provides that a member of the Bar shall not, in the absence of opposing counsel, communicate with a judge except in open court upon the merits of a contested matter pending before such judge:

> "nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge . . . concerning the merits of a contested matter pending before such judge . . . the rule shall not apply to ex parte matters."

A.B.A. Rule DR 7-110(A), Code of Professional Responsibility, provides that a lawyer shall not contact the judge as to the merits in adversary proceedings except in the course of official proceedings and "(2) In writing if he promptly delivers a copy to opposing counsel . . .".

This Honorable Court approved the trial court's taking the findings verbatim from a brief of a party, see *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184 (1944); in *Schwerman Trucking Co. v. Gartland Steam Ship Co.*, 496 F.2d 466, 475

(7th Cir. 1974), it was said that the appellate court could not ignore the District Court's findings unless they were clearly erroneous.

On the other hand, in several cases, courts have said that findings proposed by counsel and adopted by the court are less helpful or of less weight than those prepared by the Court: *United States v. El Paso Natural Gas*, 376 U.S. 651, 656 (1964); *Edward B. Marks Music Corp. v. Colorado Mag., Inc.*, 497 F.2d 285, 287 (10th Cir. 1974); *In Re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970), saying that the courts do not look with favor on the practice of adopting proposed findings verbatim and it should be limited to extraordinary cases where the subject matter is technical requiring expertise which the court does not possess.

In *Frazier v. Alabama Motor Club, Inc.*, 349 F. 2d 456, 458 (5th Cir. 1965), the court said that findings of fact based solely on undisputed evidence where there is no issue of credibility need not be given weight usually accorded findings.

Judge James M. Carter, author of the opinion below, and Bruce D. Wagner, *Findings of Fact*, 1 San Diego L. Rev. 13 (1964), point out that general order 37 in bankruptcy makes Fed. R. Civ. P., Rule 52(a) applicable in bankruptcy cases, and findings by the referee, unless clearly erroneous, must be accepted:

> "However, where the referee reaches a conclusion from given facts, neither the district court nor the court of appeals is so limited, and in such a situation either court can reach a proper conclusion from the given facts." (pp. 23-24).
>
> ". . . if the findings are based on documentary and other nondemeanor testimony, or on inferences, deductions or conclusions from uncontradicted . . . fact, the findings are subject to a lesser degree of weight." (p. 25).
>
> "A practice in . . . many western states is to ask the lawyers to prepare the findings of fact, conclusions of law and judgment. Judge Skelly Wright states that all the circuits except one have denounced this practice, and quite properly so *if the trial court automatically signs them.* . . . However, it is proper to have the lawyers submit their findings; but the judge should study them, . . . and, if necessary, completely revise them or send them back for revision . . ." (p. 32).
>
> "There should be no question that the formal findings should reflect the facts as honestly found. In some courts the judge will literally 'sew up' a party by finding facts in such a way as to negate an appeal." (p. 35).

The California requirement that findings be served and be signed only after time for objections by the party who did not prepare them should be adopted for federal procedure. If the court is not going to prepare its own findings, each party should have a voice in the findings, which should then be settled by the court. Although such practice and the California Rule of Professional Conduct was called to the appellate court's attention (Petitioner's Opening Brief, pp. 7, 51, 52), the appellate court failed to discuss the effect of the foregoing and ruled that not obtaining a stay together with the consummation of the merger on the day of the oral decision and the signing of the findings precludes an appeal.

This case clearly illustrates the vice of the verbatim adoption of findings. Many findings were clearly erroneous as a matter of law and the court found on subjects it had ruled to be irrelevant (D below). Furthermore, on the day on which the oral decision was made, in San Diego findings were signed, while in Sacramento the merger was consummated, making it difficult to obtain a stay so that appellees could contend that failure to obtain a stay renders the appeal moot and that errors of the trial court became immune from review on appeal.

D. Only by Such a Departure by the Lower Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision, Did the Court Make the Clearly Erroneous Findings That the Plan and Its Implementation Were Fair, Just and Equitable, and That the Trustees and Mr. James W. Leisner (a Director of Both Air Cal and Westgate) Satisfied Their Fiduciary Obligations to Shareholders of Air Cal.

The findings should be given little, if any, effect for reasons stated in C above; those and reasons stated below make supervision necessary. In this case, the evidence should be reweighed on appellate review.

Appellees had the burden of proof that the merger was fair and not a breach of their fiduciary duty. In *Pepper v. Litton,* 308 U.S. 295, 306, this Honorable Court said:

> "The burden is on the . . . (controlling shareholder or group of stockholders) not only to prove good faith . . . but also to show its inherent fairness from the view point of the corporation and those interested therein . . .".

The above was quoted in *Jones v. H. F. Ahmanson & Co.,* 1 Cal.3d 93, 108 and in *Mueller v. MacBan,* 62 Cal.App.3d 258, 274; 132 Cal.Rptr. 222 (1976), S.Ct. hear. den. See also *Credit Manager's Association v. Superior Court,* 51 Cal.App.3d 352, 361; 124 Cal. Rptr. 242 (1975), S.Ct. hear. den. The burden of proof that the trustee as successor to the debtor met debtor's California fiduciary duty, A above, is governed by California law: *Cities Service Co. v. Dunlap,* 308 U.S. 208 (1939), Rule 302, Fed. R. Evid.; Rule 1101, Fed. R. Evid. provides that the same applies in bankruptcy proceedings.

In this case, the party with the burden as to the California and Federal fiduciary duty failed to carry that burden so that the judgment should be reversed as in *Anderson v. General Dynamics Convair, etc.,* 589 F.2d 379, 402 (9th Cir. 1978).

The Reorganization Court found that the implementation of the merger was fair (A. 8, Note 5; A. 33). There was no evidence that the directors of Air Cal acted independently in approving the merger; yet the following was said:

> "THE COURT: It wouldn't have made a bit of difference whether they [the trustees] voted or not, though, would it, because it was a unanimous vote of the Board of Directors [of Air Cal].
>
> "MR. WOOLSEY: Yes, your Honor, and with the attorney for Westgate present and all of the directors under the control of and acting at the pleasure of the majority shareholder, eighty percent, I think the whole thing should be looked upon with suspicion.

> "THE COURT: You don't know those directors as well as I do, Mr. Woolsey. If you can find anybody more independent than Dean Gordon Schaber of the law school up there, and Bill Black, I don't know them." (Rptr. 10-4-77, p. 195:5-16).

Matters should be decided on the evidence presented in court, not what is learned outside of the courtroom. The presence of the Trustees and their counsel during the deliberations and voting by the directors of Air Cal was inherently unfair to the minority shareholders.

The Reorganization Court found that the plan and the certificate were fair (A. 36). There was no testimony that it was fair. The taking of the equity from the minority and giving it to the majority shareholder, absent a compelling purpose, is inherently unfair and cannot meet the requirement to which the Ninth Circuit Court gave lip service that:

> "The minority shareholders are treated fairly and without disadvantage." (A. 12).

The certificate was the only evidence on its fairness. The title was misleading since there was no assurance that it could result in stock of Westgate. The exchange rate described hereinabove in the statement of the case was unfair. The $15.00 per share of Air Cal stock was about seven times current earnings and the value of Westgate for purposes of the conversion will be reorganization value determined by .9 or 9.1 times estimated annual earnings for periods after the proposal of a plan of reorganization. Those estimated earnings include earnings on the interest in Air Cal assets taken from the minority.

The Reorganization Court found that the Trustees and Mr. Leisner satisfied their fiduciary duty (A. 8, Note 5; A. 33). There was no evidence that such was the case. The merger, the plan and the implementation of it, were, as matter of law, contrary to this finding.

Although the Reorganization Court found that the Westgate certificates were to be issued pursuant to a plan of reorganization (A. 36), such finding was clearly erroneous and contrary to the uncontradicted testimony of Trustee Kunzel, that the Trustees had not formulated any plan (Rptr. 10-4-77, p. 19); as admitted in the May 23, 1977 notice, no plan was submitted because of problems relating to the tuna and pet food operations "which, apart from Air Cal, constitutes Westgate's major continuing business" (Clk. R. 2553).

The Reorganization Court found that the benefits to Air Cal would be significant only if Westgate is reorganized (A. 32). There was no assurance that it will be reorganized. It was unfair to take the equity from the minority before it was determined that Westgate would be reorganized.

The alleged benefits to Air Cal did not constitute purposes of the merger even under the Delaware test, that is, not to be suspect of subterfuge, the real purpose of which is to eliminate unwanted minority shareholders: *Tanzer v. International Gen. Ind.*, 379 A.2d 1121, 1124 (Del. Supr. 1977) which must not be contrived as said in *Young v. Valhi, Inc.*, 382 A.2d 1372, 1378 (Del. Ch. 1978). In the latter case, a merger to eliminate potential conflicts of interest and to obtain the 80% ownership required for consolidated

tax returns (which could have been accomplished by buying some shares, not all) were contrived. If the reasons found in this case were sufficient, the requirement for a reason or purpose would be absolutely meaningless. In any merger, such benefits can be claimed to cover the purpose to take the benefit from the minority for the purpose of enhancing the position of the majority.

The reasons cited by the Ninth Circuit (A. 12-13; 31-33) were:

1. Relief from "the reporting requirements imposed on public corporations" (A. 12-13, 31, Clk. R. 393).

The uncontradicted testimony by witnesses for the Trustees was that there was no saving in operating costs (Rptr. 1-14-77, p. 36). The uncontradicted testimony was that the same audit expenses would be required of Air Cal even as a wholly-owned subsidiary of Westgate, if and when stock of Westgate be publicly traded (Rptr. 10-4-77, pp. 109, 110). The Trustees contemplated that if Westgate be reorganized, stock of the new Westgate would be publicly traded. Air Cal, as the only profitable subsidiary of Westgate, would bear 100% of the expenses. There was no finding concerning the net savings over the costs of the merger estimated at $350,000.00 by respondents; there was no balancing of detriments in losing the public market and its advantage for key employee stock options and other advantages. There was no finding that the expenses saved were material. When Westgate bought Air Cal stock, it knew that Air Cal was publicly traded with the reporting requirements which it probably considered to be an advantage.

As stated by Steven W. Hamilton in 4 J. Corp. Law, No. 1, 122 (Fall, 1978), such purported savings by avoiding reporting is specious and:

> "Such a result is harmful to investor confidence and the securities markets and courts should not sanction such majority conduct without substantial justification."

2. The alleged greater access to capital markets after reorganization of Westgate (A. 13, 31-32) because Westgate intended to maintain 80% ownership required for consolidated tax returns and had no intention of selling its shares in Air Cal or permitting a dilutive equity offering (Info. Stmt. 2; Clk. R. 393). Whether Westgate would permit such was ruled to be immaterial (Rptr. 1-14-77, p. 48). Air Cal's president testified that diversification would be an advantage only if the assets were viable and worthy (Rptr. 10-4-77, p. 91). Westgate's assets other than Air Cal produced losses prior to and during the Chapter X proceeding. Air Cal did not need financing at the present time, but would in three or four years (Rptr. 1-14-77, p. 48). The need for capital was disproven by the redemption by Air Cal on August 10, 1976, of $3,361,000.00 par value of its 7% debentures due in 1988, for $3,492,000.00. The undisputed testimony was that Air Cal would have better access to equity capital and credit than a company in reorganization under the Bankruptcy Act (Rptr. 10-4-77, p. 108 and 1-14-77, p. 38). If equity financing is needed, the majority shareholder's duty would be to permit an equity offering. Presumably Westgate will not have the tax losses which justify filing consolidated returns indefinitely. Some of the loss producing assets were sold before the merger but not the cannery business (Rptr. 1-

14-77, p. 64); the Trustees may sell the remaining loss producing assets. Capital requirements with respect to Airport facilities were ruled by the court to be immaterial (Rptr. 1-14-77, p. 88).

3. The removal of potential conflicts of interest (A. 13 and 31) is likewise contrived as held in *Young v. Valhi, supra.* Although Westgate acquired its ownership in Air Cal in 1970, there was no evidence of any problem arising out of any conflict of interest. On the contrary, Air Cal pays to Westgate affiliates 82% of the tax savings by the filing of consolidated tax returns, leases aircraft from a Westgate affiliate, participates in Westgate's retirement plan and has common directors (Info. Stmt. 25, 27, and 28). Hamilton, 4 J. Corp., Law at 124, disapproves of removal of conflicts as a ground of a merger.

4. Greater availability to Air Cal of Westgate's management skills (A. 10 and 32). The President of Air Cal, as a witness for Trustees, testified that management assistance was not necessary in Air Cal's operations (Rptr. 1-14-77, p. 79). The only evidence of management skills was Messrs. Kunzel and Trone's alleged management expertise. The court knew that Mr. Kunzel would not stay on and that he was mad that the court had appointed him[3] and Mr. Kunzel testified that he did not intend to stay on after the Chapter X proceeding (Rptr. 1-14-77, p. 57); the court sustained Trustees' objection to interrogation as to whether or not Mr. Trone had indicated that he would stay on after the proceedings as irrelevant (Rptr. 1-14-77, pp. 56-57). If, after the merger, management

[3]A certain familiarity between trustees and the court is unavoidable. However, information so obtained should be kept out of the decision making process in litigated matters.

in Westgate be available to Air Cal, the uncontradicted testimony was that it would be available even if Air Cal remained only a partially-owned subsidiary (Rptr. 10-4-77, pp. 110-111).

The Reorganization Court's on the one hand precluding evidence on several of the alleged benefits of or reasons for the merger as irrelevant and, on the other hand, making findings that there were such benefits and reasons is gross error.

No cash dividends have been paid by Air Cal and yet the trial court prevented as immaterial inquiries as to why (Rptr. 1-14-77, p. 42). As said by O'Neal and Derwin, "Oppression of Minority Shareholders", page 62:

> "The withholding of dividends is by far the most frequently used squeeze-out technique."

The Reorganization Court heard and decided the case on the theory that no purpose was required and sustained objections to the materiality of cross-examination on such evidence and said it had to determine whether $15.00 was fair and, nevertheless, made findings of benefits to Air Cal.

There was no evidence presented by the Trustees that the only alternative for the future of Air Cal was a complete takeover by its controlling shareholder. Instead, the record indicates that no other alternative was considered by Air California's Board of Directors. In October, 1976, Air Cal's president, who had previously never contemplated a merger or any other reorganization of Air Cal, was informed by Westgate's additional Trustee, Mr. Kunzel, that Westgate contemplated the takeover (Rptr. 1-4-77, pp. 74-75), and investment bankers were retained (Rptr. 1-14-77, p.

69), for an aggregate fee of $125,000.00 to render their opinion as to only the fair value of the shares of the minority holders. The proposed merger was publicly announced on November 6, 1976. The merger approval by Air Cal's Board of Directors, with Trustees' counsel present at all times during the discussion and vote, was without any independent deliberation but was dominated by the Trustees. The purported reasons for the merger were clearly not indicative of a "compelling business purpose." The evidence presented by the Trustees was insufficient to meet even the lower standard under the "Business Judgment" rule.

E. The Opinion Below That the Consummation of the Merger Without Petitioner's Obtaining a Stay Rendered the Appeals Moot Raises a Question Not Heretofore Settled Which Should Be Settled Contrary to the Position Taken by the Court Below.

The question as to whether or not consummation of the merger on the very day of the court's decision and the written order authorizing the merger, bars an appeal from the order is an important question which should be settled by this court.

Rule 62(a), Fed. R. Civ. P. provides that proceedings shall not be taken for the enforcement of a judgment until the expiration of ten (10) days after its entry. As said in *In Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 192 (9th Cir. 1977):

> "The district court, while not stating any reasons for its decision, concluded that Fed. R. Civ. P. 62(a) was inapplicable 'to orders of a district court sitting in bankruptcy and relating to sales of property of the debtor'. . . . 2A Collier on Bankruptcy 14th Ed., ¶25.12, pp. 957-59 (1976) is to the contrary as is *U.S. Manufacturers Equip. Company v. Rugh*, 29 F. Supp. 40 (W.D.Pa. 1939) . . . as has been noted above, we cannot reverse or void the sale; it was completed in accordance with a valid order of the district court and the purchaser is not a party to this appeal."

The rule adopted in the opinion of the court below has the effect of depriving the parties of the right to appeal. The parties could not seek a stay during the short interval between the announcement of a decision of the court and the signing of the order, not previously served on counsel, unless counsel had anticipated the ruling and the grounds therefor and had the application prepared before knowing the contents of the order to be stayed.

The Trustees' application was before the Reorganization Court for over nine months. The Trustees' rush to get the order signed and the merger consummated should not immunize the Trustees from appellate relief. In the spirit of said Rule 62(a), the Trustees should have paused for a few hours in order that objectors to Trustees' application could seek a stay.

Requiring that a stay be sought or obtained as a condition to a right to appeal implies that, if granted, the required bond would be put up. A delay in the merger could have delayed reorganizing Westgate, causing hundreds of thousands of dollars in administration and other expenses; a large bond would have been required.

Such a requirement would effectively insulate the decision from appellate review in all cases where the abused holders of minority shares individually hold

only a small number of shares or are of limited financial means. The requirement that there be a stay is discriminatory and a stay would have been contrary to the best interests of debtor. Neither a stay nor an application therefor should be required.

Due process of law does not require that an appeal be available as said in *Abney v. United States*, 431 U.S. 651 (1977). However, once appellate review is available, due process requires it be unfettered, *Castle v. United States*, 399 F.2d 642, 650 (5th Cir. 1968).

Valley unsuccessfully sought a stay; for others to have sought a stay would have been an idle act not required by the law.

In this case, the opinion on appeal erroneously stated that the appeal sought to "negate the effects of a merger" (A. 1) and to the extent appellant seeks a negation of the merger, the remedy is not available (A. 17). Petitioner concedes that no shareholders of Air Cal can be compelled to return the certificate or cash received for shares in Air Cal. The court can compel Westgate to (1) return assets to old Air Cal and stock in Air Cal to former shareholders who consent to being reinstated; (2) suffer the impression of a trust on the proportion of shares held by respondent in the new Air Cal equal to the proportion of shares in old Air Cal taken from shareholders desirous of giving up the certificate or cash in return for stock; (3) pay the former minority shareholders of Air Cal a sum equal to the benefits to Westgate (*e.g.* enhancement of reorganization value) in excess of the $15.00 per share, (4) issue warrants to purchase the stock, or (5) pay damages equal to the excess ~~of~~ OVER $15.00 of the value or price of an appropriate number

of shares of Westgate stock a reasonable time after the reorganization, if any, when the market will have evaluated the stock absent the depressing effect of reorganization proceedings. In any event, findings that the implementation of the merger was fair and that the three Directors of Air Cal who were Directors and/or Trustees of Westgate satisfied their fiduciary obligations should be deleted. These findings may influence the trier of fact in the suit by debenture holders who seek a remedy because of the calling of the debentures without any disclosure of the plan to merge. After judgment, petitioner moved to have the findings amended to state that they are without prejudice to the rights of the debenture holders (Clk. R. 419 to 423).

Unlike in *In Matter of Combined Metals Reduction Co., supra*, relied on in the opinion herein, we do not seek to set aside the merger here (sale there); we seek only other remedies for the shareholders who have been deprived of their interest in Air Cal.

In *Mills v. Electric Autolite Co.*, 396 U.S. 375, 387 (1970), this Honorable Court said:

> ". . . Possible forms of relief will include setting aside the merger or granting other equitable relief, but, as the Court of Appeals below noted, nothing in the statutory policy 'requires the court to unscramble a corporate transaction' . . . In selecting a remedy, the lower courts should exercise 'the sound discretion . . .'."

Our case is more like *Bosley v. City of Euclid*, 496 F.2d 193, 196 (6th Cir. 1974), where the court held that the demolition of structures the right to possession of which was in issue did not make the appeal

moot because there remained issues of damages and incidental relief.

As said in *Ramberg v. American Investment Co. of Illinois*, 231 F.2d 333, 336 (7th Cir. 1956):

> ". . . And even where the subject matter has been so completely destroyed . . . the court still has jurisdiction to grant incidental relief and the cause is not moot."

The cure for the Trustees' action is straightforward, an offer to restore to their previous status, the minority shareholders who opted for cash in the face of a *fait accompli.*

DATED: October 19, 1979.

Respectfully submitted,

ROY B. WOOLSEY,
In Propria Persona.

Of Counsel:
WOOLSEY, ANGELO & THATCHER.